

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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TENNENBAUM CAPITAL PARTNERS LLC, 07 Civ. 9695 (LTS) (DCF)

Plaintiff,

**PRELIMINARY PRE-TRIAL  
STATEMENT**

-against-

MICHAEL T. KENNEDY,

Defendant.

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The undersigned counsel for the parties hereto submit the following in response to this Court's Order of November 13, 2007 with respect to the filing of a Preliminary Pre-Trial Statement. At present, no allegations of the Complaint have been admitted or denied because under the terms of the parties' Stipulation dated December 27, 2007, so-ordered by this Court on January 2, 2008 (Docket no. 8), Defendant's time to respond to the Complaint was extended to "seven (7) days after Plaintiff's counsel has given Defendant's counsel a written demand" therefor. Plaintiff's counsel served that 7-day demand on Thursday, August 7, 2008, making Defendant's response to the Complaint due on Thursday, August 14, 2008, which is one day prior to the conference scheduled for August 15, 2008 and subsequent to the submission of this Preliminary Pre-Trial Statement. (This paragraph is referred to herein as "the Preamble".)

- a. This is an action to recover \$10 million, plus interest and attorneys' fees, as a result of Defendant's alleged breach of a written guaranty.
- b. Plaintiff alleges that (i) this Court has subject matter jurisdiction over this action under 28 U.S.C. §1332, as there is complete diversity; (ii) Plaintiff

is a limited liability company organized under Delaware law; (iii)

Plaintiff has 12 members, each of whom or which is a citizen of the State of California; and (iv) none of the members of Plaintiff is a citizen of the State of Pennsylvania. Defendant denies knowledge or information with respect to any of the foregoing as uniquely within the knowledge of Plaintiff and will require discovery regarding these allegations as well as whether this Court possesses jurisdiction over the action. Defendant is a citizen of the State of Pennsylvania.

- c. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to paragraphs (c).
- d. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.
- e. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.
- f. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.
- g. Plaintiff's complaint asserts one claim: to recover \$10 million, plus interest and attorneys' fees, as a result of Defendant's breach of the Guaranty and Negative Pledge Agreement. Plaintiff further asserts as follows: This claim is for common-law breach of contract. The Guaranty states that it is governed by New York law. Under New York law, a *prima facie* case for breach of a guaranty is established by demonstrating (1) an absolute and unconditional guaranty; (2) the underlying debt; and

(3) failure of the guarantor to perform under the guaranty. *See Primeco, Inc. v. Artemis, SA*, 1995 WL 766311 (Dec. 29, 1995) (Baer, DJ); *Industrial Bank of Japan Trust Co. v. Haseotes*, 1993 WL 322775 (S.D.N.Y. Aug. 19, 1993) (Kram, DJ); *Fundex Capital Corp. v. Rochelle*, 2006 WL 547794 (S.D.N.Y. March 7, 2006) (Report of Magistrate Judge Francis), *citing Buffalo and Erie Regional Development Corp. v. World Auto Parts, Inc.*, 306 A.D.2d 857, 858, 761 N.Y.S.2d 893, 894 (4<sup>th</sup> Dep't 2003); *Kensington House Co. v. Oram*, 293 A.D.2d 304, 304-05, 739 N.Y.S.2d 572, 572-73 (1<sup>st</sup> Dep't 2002); *City of New York v. Clarose Cinema Corp.*, 256 A.D.2d 69, 71, 681 N.Y.S.2d 251, 253 (1<sup>st</sup> Dept 1998).

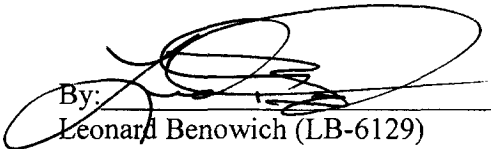
- h. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.
- i. Plaintiff asserts that the measure of proof is as stated in the Guaranty, and the burden of proof falls on Plaintiff to establish the *prima facie* case as described in paragraph (g), above. Given the circumstances described in the Preamble, counsel for Defendant is unable to provide a substantive response to this item.
- j. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.
- k. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.

- l. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item; *see* response to paragraph m, below.
- m. Plaintiff does not believe that it needs discovery with respect to the claim asserted in its Complaint. Given the circumstances described in the Preamble, counsel are otherwise unable to state whether any discovery will be required (subject to paragraph n, below).
- n. Plaintiff does not believe that any expert evidence will be required. Defendant expects that expert discovery will likely be required.
- o. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.
- p. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.
- q. Plaintiff asserts that the Guaranty contains a waiver of jury trial and that the case should be tried without a jury. Given the circumstances described in the Preamble, Defendant's counsel is unable to provide a substantive response to this item at this time, and counsel are unable to state how long the trial, if any is required, is likely to be.

- r. Given the circumstances described in the Preamble, counsel are unable to provide a substantive response to this item.

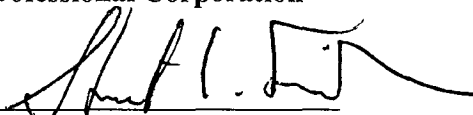
Dated: August 12, 2008

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